Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	94-104
	)	
Omnibus Budget Reconciliation Act of 1993	)	PR File No. 94-SP2
Implementation of Sections 3(n) and 332(c)	)	
of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

U S WEST NEWVECTOR OPPOSITION

U S WEST NewVector Group, Inc. ("NewVector"), which provides cellular services throughout much of Arizona,[1] opposes the petition filed by the Arizona Corporation Commission ("ACC") to "Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services" ("Pet.").

I. Introduction and Summary

While the ACC seeks authority "to retain entry and rate regulation" over "all" providers of commercial mobile radio services (Pet. at 1 and 22), its petition discusses only one segment of the CMRS market: cellular services. This is because the ACC has previously deregulated all CMRS services other than cellular services (on the ground they were beyond its jurisdictional reach). In addition, the ACC regulates only a portion of the cellular services CMRS submarket: only the "wholesale" rates charged by "cellular wholesale providers." Pet. at 8. The ACC does not regulate, and has never regulated, the prices paid by the public for retail cellular services. Thus, consistent with

[1]NewVector, either directly or through partnerships in which it has a partial interest, provides cellular services in the two Arizona MSAs (Phoenix and Tucson) and in four of the six Arizona RSAs (Nos. 2, 4, 5 and a portion of the recently partitioned RSA 6).

the requirements of Section 332(c)(3)(B),[2] the ACC petition must be treated as a petition to retain entry and rate regulation only over the "wholesale" rates charged by "wholesale" cellular carriers.

The ACC petition must be denied. First, Congress has preempted all state regulation of the entry of CMRS providers. Second, the ACC has failed to meet the burden which Congress established to overcome its federal preemption of state rate regulation of CMRS. The few allegations the ACC makes in its petition either are not relevant to the statutory standard or are flatly contradicted by the facts.

In the end, the ACC wants to continue the very sort of uneven and detailed state regulatory scheme which Congress has determined must be eliminated if the CMRS market is to flourish and if the public is to enjoy the resulting benefits. The ACC's effort to maintain its disparate and intrusive regulatory scheme must be rejected if these Congressional objectives are to be achieved.

II. The ACC Petition Contains Numerous Misstatements of Material Fact

As an initial matter, the ACC petition contains numerous misstatements of fact concerning the extent of the ACC's regulation over the CMRS market; the state of competition within the Arizona cellular market; and the extent that cellular service has become a substitute for basic landline service in Arizona. Because this Commission should base its "exception to preemp-

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[2]That provision provides that "[i]f a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may . . . petition the Commission requesting that the State be authorized to continue exercising authority over such rates."

tion" decision on facts (as opposed to unsupported assertions), NewVector is compelled to point out the material factual inaccuracies contained in the ACC petition.

A. The Scope of the ACC's Actual CMRS Regulation. The ACC leaves the impression that it regulates all CMRS providers equally and that it does so because it has made an affirmative determination that continued CMRS regulation is required:

> The [ACC] is . . . responsible for the regulation of all telecommunications services within [Arizona]. Acting in this capacity, the ACC has already held an evidentiary proceeding in which it considered, and rejected, deregulation of commercial mobile radio services ("CMRS"). * * * Commercial mobile radio service providers licensed by the FCC and operating in Arizona currently function under a detailed regulatory structure that has general application for all public utilities. Pet. at 1-2.

The ACC also devotes several pages in its petition to summarizing the "detailed regulatory structure" which it asserts is applied to "all" CMRS providers. *See* id. at 3-5.

In fact, the ACC regulates only a handful of the hundreds of CMRS providers in Arizona.[3] In 1985 the ACC deregulated paging services, concluding that, while "radio paging is a part of telephone service," it is "neither essential nor integral to other basic public telephone services" and that the ACC "has no jurisdiction under [the Arizona Constitution] to regulate tele-

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[3]Evidence before the ACC in 1987 indicated more than 120 two-way CMRS providers were then operating in Arizona, including multiple providers in rural communities such as Page in northern Arizona and Yuma in southern Arizona. *See* Testimony of James Murphy, Exhibit No. 3, Docket No. E-1051-86-016. There are also dozens of one-way CMRS providers operating in Arizona as well.

communications services which are not essential and integral to the provision of basic public telephone services."[4]

In 1987 the ACC then deregulated public land mobile and rural radio services, stating:

> Though [these services] can be interconnected with the local exchange, the network providing this service is discrete and separable from the public telecommunications network. We take note that a very small segment of the public avails itself of this service. Therefore, we find that the public does not have an interest in mobile radio and it is not a public service pursuant to [the Arizona Constitution].[5]

Among the services the ACC deregulated in this order were Improved Mobile Telephone Service ("IMTS") and rural radio services, including Basic Exchange Telecommunications Radio Service ("BETRS"), where radio spectrum, rather than wireline loops, is used in providing rural customers with basic local exchange service. At the time of the ACC's deregulation order, there were 110 residents whose basic service was provided by fixed rural radio services.[6]

The deregulation of fixed rural radio services is particularly relevant to the ACC petition for two reasons. First, the ACC affirmatively deregulated this service even though the evidence demonstrated that fixed rural radio

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[4]In the Matter of the Application for an Order Deregulating the Paging Industry, Docket No. U-0000-84-267, Decision No. 54488, Conclusions of Law Nos. 2-4 (April 25, 1985).

[5]In the Matter of the Application for Deregulation and the Withdrawal of Filed Tariffs Relating to the Mobile Radio Common Carrier Industry, Docket No. E-1051-86-016, Decision No. 55633, at 6 (July 2, 1987). Of course, the ACC has not regulated those CMRS providers that historically were considered private radio service.

[6]*See* Testimony of David Berry, Chief Economist, ACC Utilities Division, Docket No. E-1051-86-016, at 3 (March 1987).

provided some Arizonans their only means of basic local exchange service. Second, after many years of BETRS availability, only 110 rural customers in a statewide population of more than three million were substituting radio spectrum for a wireline loop.

Thereafter, in 1989, the ACC rejected the recommendation of its staff and declined to deregulate cellular service.[7] The ACC decision does not explain why it determined cellular to be "essential" to the provision of basic telephone services while competing mobile services like IMTS and public land mobile and fixed rural radio services like BETRS were "not essential." Instead, the ACC based its decision to retain authority over wholesale cellular carriers because (a) at the time, cellular service had not commenced in any Arizona RSAs (because of licensing delays) and (b) there had been "substantial growth" in the cellular services provided in the two MSAs (Phoenix and Tucson).[8]

Lastly, while the ACC declined to deregulate cellular services in 1989, it does not regulate, and has never regulated, all aspects of cellular service. Rather, the ACC "regulates cellular wholesale providers" only. Pet. at 8. It has never regulated the prices cellular carriers and cellular resellers charge the public for cellular service.[9]

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[7]In the Matter of the Application for Deregulation and the Withdrawal of Filed Tariffs Relating to the Mobile Radio Common Carrier Industry, Docket No. E-1051-86-016, Decision No. 56314 (Jan. 12, 1989), a copy of which is appended as Appendix No. 1 to the ACC petition.

[8]Id. at 12 ¶ 13.

[9]*See, e.g.,* Metro Mobile v. NewVector, 661 F. Supp. 1504, 1510-11 (D. Az. 1987), *aff'd,* 892 F.2d 62 (9th Cir. 1989)("It is undisputed that the ACC . . . has not attempted to regulate retail cellular rates."). In this case, the courts rejected the claim by the non-wireline Phoenix

B. State of CMRS Competition in Arizona. As noted, there are hundreds of unregulated CMRS providers operating in Arizona.[10] The ACC petition addresses only one segment of the broadband CMRS market: cellular services. The ACC makes several assertions about the "cellular" portion of this CMRS market -- all of which are contrary to known and uncontroverted facts.

The ACC first asserts that Arizona "wireline" licensees (often NewVector) have a "substantial advantage" over Arizona "non-wireline" licensees (often Bell Atlantic, itself an affiliate of a wireline carrier):

> [I]n most cellular market areas the wireline licensee is provided a substantial advantage over the non-wireline provider. In some markets these advantages may be too profound for competitors to attain or attract a sizable market share. Pet. at 15.

However, the ACC does not document its allegation of "substantial advantage," nor does it explain why and how a wireline affiliate might possess such an advantage.

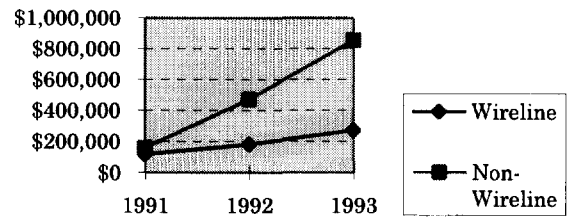
This ACC claim is not credible on its face. If wireline affiliates truly possessed a "substantial advantage" over non-wireline licensees, it is doubtful that Bell Atlantic would have purchased non-wireline licensees in Arizona -- much less continued to acquire additional Arizona non-wireline licensees.

MSA licensee that NewVector possessed monopoly power during the headstart period almost a decade ago.

[10]The ACC has chosen not to respond to the FCC's invitation to specify the number of CMRS providers in the state, the types of services they offer, and the rates they charge; nor has the ACC provided other "evidence, information, and analysis" deemed pertinent to the FCC's examination of "market conditions and consumer protection." *See* Second CMRS Order, 9 FCC Rcd at 1504-05.

In any event, facts available to the ACC rebut entirely its unsubstantiated and unexplained claim. In five of the six Arizona RSAs, the non-wireline cellular carrier received its FCC license before the wireline carrier, and in four of the RSAs the non-wireline carrier received its ACC license before the wireline carrier. *See* Attachment A. Coverage maps on file with this Commission demonstrate that, in every cellular serving area in Arizona, the non-wireline carrier has coverage generally equal to, and in some cases greater than, the wireline carrier. Moreover, annual reports submitted to the ACC document that cellular carriers are enjoying substantial growth and that non-wireline carriers enjoy a sizable market presence in each Arizona cellular serving area. For example, the non-wireline licensee in RSA-3 has almost triple the wholesale revenues of its competing wireline licensee:

Wholesale Cellular Revenues in AZ RSA-3



Similarly, the non-wireline system in RSA-4 had 1993 wholesale revenues more than double those of the wireline provider. The point is that, contrary to the ACC's claim, there is no evidence that wireline licensees possess any advantage over non-wireline licensees -- much less that they possess a "substantial advantage."

The ACC also asserts that "not all market areas [in Arizona] are capable of supporting the duopoly competitive structure envisioned by the FCC"

and that there are rural areas "where the cellular market is fully monopolistic." Pet. at 2 and 11 n.12. Specifically, according to the ACC, only one cellular carrier (the wireline licensee) currently provides service in Arizona RSAs 1 and 2:

> [I]n some RSAs, a wholesale provider provides only roaming service leaving but a single, or monopoly provider of basic cellular service. Such a condition currently exists in Arizona RSA-1 and RSA-2.
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> * * *
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> For example, only the wireline licensees in Arizona RSA-1 and RSA-2 currently provide basic cellular service to customers through their retail affiliates. The non-wireline providers in these two rural markets currently offer only roaming service. In these cases, effective competition does not currently exist. Pet. at 11 n.12 and 15.

These undocumented claims are, again, contrary to known facts. The ACC's own chart of local licensing activity demonstrates the presence of two facilities-based cellular carriers in each Arizona RSA. *See* Pet. at 9-11. Although litigation delayed entry of the wireline licensee in RSA-1 and the non-wireline licensee in RSA-2, there are now two facilities-based systems operating in both RSAs. *See* Attachment A. Bell Atlantic is currently seeking to acquire the non-wireline licensee in RSA-2 which, when consummated, will undoubtedly lead to greater competition in that service area.[11] In RSA-1, annual reports of wholesale revenues submitted to the ACC demonstrate substantial revenue growth for both systems. Moreover, the wholesale rates charges in the supposedly non-competitive RSAs 1 and 2 are comparable to

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[11]Bell Atlantic received its FCC license for RSA-2 months ago. However, its acquisition of that non-wireline license has been needlessly delayed because of delays associated with the ACC's certification process.

the wholesale rates in the other RSAs which the ACC concedes are competitive.

C. Cellular Substitution for Landline Service. Throughout its petition, the ACC asserts that cellular service has become a substitute for landline service in the six Arizona RSAs. *See* Pet. at 2, 7, 17 and 19-20. However, the sole source the ACC cites in support of this repeated contention, in fact, stands for the direct opposite proposition. In the excerpted pages referenced by the ACC, a U S WEST employee testified as follows when asked about the impact cellular service has had on basic exchange services:

> [T]here is little evidence today that cellular service is actually replacing traditional wireline service. Pet., Exhibit 5 (emphasis added).

This ACC-submitted testimony is also consistent with the evidence developed before the ACC in the late 1980s that the now-deregulated BETRS service provided basic exchange service to only 110 rural Arizonans.

In fact, NewVector is aware of no evidence supporting the ACC's undocumented assertion that cellular service "is becoming" a substitute for basic landline service. The percentage of Arizona households with landline service has grown from 86.9% in 1984 to 94.1% in March 1994 -- a penetration level greater than the current national average (93.9%).[12] This growth is no doubt due in part to the fact that wireline service is substantially cheaper than cellular service, especially in Arizona's rural areas. While residential customers of rural Arizona telephone companies pay between $4.50-

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[12]Telephone Subscribership in the United States, Table 2 (Industry Analysis Division, Aug. 30, 1994).

$12.00 monthly for single party basic local (and wireline) exchange service,[13] a cellular customer currently spends an average of $58.63 monthly (excluding toll and roaming charges) for cellular service.[14]

In summary, the ACC petition contains material misstatements of fact, and these misstatements undermine the legitimacy of the petition and the showings contained therein.

III. The Request to Maintain Market Entry Regulation Over Wholesale Cellular Providers Must Be Denied

The ACC seeks permission to continue market entry regulation over CMRS providers.[15] This Commission cannot lawfully grant this request.

In Section 332(c)(3)(A) of the Communications Act, Congress pre-empted the states from all entry regulation over CMRS providers:

> Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. (Emphasis added.)

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[13]*See, e.g.*, Arizona Telephone Company ($6.50); Citizens Utilities Company ($9.40); Southwestern Telephone Company ($7.00); Universal Telephone Company of Southwest ($4.50); and Valley Telephone Cooperative ($12.00). Pertinent pages from these companies' ACC tariffs can be provided upon request.

[14]*See* Mid-Year Results Show Wireless Customers Near 20 Million Mark; Monthly Bills Drop (CTIA News Release, Sept. 6, 1994)("Monthly prices for wireless service continue to decline. The average monthly bill for subscribers dropped to $58.65 during the first six months of 1994, from $67.31 per month in June 1993. This amounts to nearly a 40 percent decline since 1987, when the average monthly bill was $96.83.").

[15]Consistent with its CMRS deregulation orders, the ACC has imposed entry regulation on wholesale cellular providers only. Consequently, the request to continue to exercise entry regulation over wholesale cellular providers is curious on its face -- given that all facilities-based cellular licensees in Arizona have already obtained an entry certificate from the ACC.

Congress took this action "to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." Second CMRS Order, 9 FCC Rcd at 1504 ¶ 250.

While Congress authorized states to seek to continue their existing rate regulation under limited circumstances, it did not provide similar authorization regarding entry regulation. *See* 47 U.S.C. § 332(c)(3)(B). Consequently, the request of the ACC to continue to exercise some market entry regulation over CMRS providers must be denied as a matter of law.

IV. The Request to Maintain "Some" Rate Regulation Over "Some" CMRS Providers Must be Denied

Congress has specified two circumstances under which states can petition to retain rate regulation over CMRS providers. It has further determined that states bear the burden of establishing that one of these conditions exists,[16] and that, in close cases, this Commission should deny state petitions to retain rate authority:

> In reviewing [state] petitions under clause (ii), the Commission also should be mindful of the Committee's desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee. House Report at 261-62.

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[16]Section 332(c)(3)(B) authorizes this Commission to grant state petitions to continue CMRS rate regulation only "if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii)." (Emphasis added.) *See also* Second CMRS Order, 9 FCC Rcd at 1504 ¶ 251 ("Any state filing a petition pursuant to Section 332(c)(3) shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates," and "[i]f we determine that the state has failed to meet this burden of proof, then we will deny the petition.").

Congress also directed that state proposals to retain rate regulation be consistent with the overall intent of its legislation -- including its directive for regulatory parity among competing CMRS providers:

> [T]he Commission, in considering the scope, duration or limitation of any State regulation, shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment. Conference Report at 494 (emphasis added).

The ACC petition fails all these Congressionally-imposed criteria and objectives. The petition does not demonstrate the presence of either circumstance warranting an exemption to rate preemption. The ACC moreover wants this Commission to authorize a regulatory scheme that on its face is discriminatory in design and effect -- applicable only to some CMRS providers (*e.g.,* wholesale cellular carriers) and not to their CMRS competitors. Finally, the ACC wants this Commission to authorize what the ACC readily concedes is a "detailed regulatory structure" for wholesale cellular carriers even though it elsewhere admits in its petition that this intrusive regulation is no longer necessary or appropriate.

A. The ACC Petition Fails to Establish the Presence of The Statutory Circumstances Warranting an Exemption to Federal Preemption

As noted, Congress has declared that states may regulate CMRS rates in one of two specified circumstances. The ACC petition has not demonstrated the presence of either condition. This alone warrants rejection of the petition.

1. Congress has specified that rate regulation may be appropriate when CMRS service "is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such State." 47 U.S.C. § 332(c)(3)(A)(ii)(emphasis added). The ACC petition fails to demonstrate that cellular service is a replacement for landline exchange service anywhere in Arizona -- much less that cellular service is such a replacement in a "substantial" portion of the state. Indeed, as documented above, the ACC's own evidence is to the contrary. *See* pages 9-10 *supra*. Also as discussed above, the ACC's undocumented claim concerning cellular substitution for landline service is contradicted by the growing penetration of wireline service throughout Arizona. *See* ibid.

Moreover, the ACC does not claim that cellular service currently is a substitute for landline service, only that (in its view) cellular service "is becoming" a substitute for such service. Pet. at 7. *See also* id. at 2, 17 and 19-20. This "is becoming" assertion is wholly undocumented and inconsistent with the explicit language of the statute.

The "is becoming" assertion is also irrelevant given the state of CMRS competition in Arizona. As documented above, Arizona residents can choose among competing cellular services everywhere cellular service is available. Arizona residents can also seek service from deregulated non-cellular CMRS providers. Congress has made it clear that continued rate regulation over CMRS services is inappropriate where, as here, consumers have a choice among several CMRS providers:

> If . . . several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should

be permitted to regulate these competitive services simply because they employ radio as a transmission means. Conference Report at 493 (emphasis added).

The ACC petition therefore fails to establish the first of the statutory conditions warranting an exemption to federal preemption.

2. Congress has also declared that limited, continued state rate regulation may be appropriate when "market conditions with respect to [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A)(i). The ACC petition also completely fails to establish the presence of these market conditions. Moreover, it does not explain the nexus between its regulatory scheme and the protection of consumers against unreasonable retail rates. [17]

The ACC petition does not contain any evidence that market conditions fail to protect Arizona cellular subscribers from cellular prices which are unjust or unreasonable. This omission is understandable because the evidence is that cellular rates in Arizona -- at both the wholesale and retail level -- have been declining, a fact the ACC does not challenge.[18] Wholesale access discounts on file with the ACC now range from 50-71%, and usage dis-

[17]The focus of this statutory standard is on "subscribers" of CMRS service. It bears repeating that the ACC does not regulate, and has never regulated, the retail rates cellular carriers charge their subscribers. Thus, even if retail market conditions were such that consumers might not be fully protected against unreasonable rates (and there is absolutely no such evidence), the ACC's current regulatory scheme would not protect consumers given the ACC's exclusive focus on wholesale rates.

[18] NewVector is not aware of a single rate case in Arizona where a cellular carrier attempted to raise its rates. NewVector is advised that earlier this year Bell Atlantic both increased its discounts and dropped the tariffed maximum rates against which those discounts apply. All available data shows that the cellular portion of the CMRS market is competitive -- including the RSAs where the introduction of service was delayed due to licensing complications. *See* Attachment A.

counts range from 30-50% in the MSAs. A variety of wholesale discounts are also available in the RSAs, with one system discounting access by more than 70% and usage between 20% and 50%.

The presence of two licensed cellular operators in each Arizona cellular serving area ensures that the cellular customers will continue to enjoy reasonable rates for their cellular service. Moreover, the entry of additional market participants -- enhanced (or wide-area) SMR and three-to-six new broadband PCS licensees -- will ensure that the mobile services market will soon become super-competitive.

Nor does the ACC petition contain evidence that market conditions fail to protect cellular subscribers from discriminatory rates. The petition's allegations in this regard are limited to the unsupported assertion that there is a "potential" that wholesale providers "may" discriminate against non-affiliated retail providers *vis-à-vis* their own affiliated retail operations. Pet. at 16. This concern about "potential" discrimination does not meet the statutory requirements nor does the petition address the fact that this Commission already prohibits cellular licensees from discriminating against resellers.[19] The ACC petition does not allege, much less demonstrate, why the existing federal scheme is inadequate or why it is necessary for the ACC to exercise concurrent jurisdiction with this Commission.[20]

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[19]*See* 47 C.F.R. § 22.914. *See also* Cellular Communications Systems, 86 F.C.C.2d 469, 511 (1981), *modified*, 89 F.C.C.2d 58 (1982), *further modified*, 90 F.C.C.2d 571 (1982), *appeal dismissed*, No. 82-1526 (D.C. Cir., March 3, 1983); Cellular Resale Policy, 7 FCC Rcd 4006 (1992), *aff'd*, 965 F.2d 1106 (D.C. Cir. 1992).

[20]This Commission is more than willing to entertain complaints filed by resellers against cellular licensees. *See, e.g.*, Cellnet v. Detroit SMSA, DA 94-766, E-91-95 (July 8, 1994).

The ACC's remaining concerns, which appear to have no relevance to its continued rate authority over wholesale cellular providers, can be discussed summarily. The ACC appears to express a concern that, without continued rate authority, it will somehow be unable to entertain consumer complaints. *See* Pet. at 5. In making this allegation, however, the ACC does not explain how rate authority is related to its entertaining customer complaints, or even that cellular complaints have been a problem or a matter of concern at the ACC.[21] For example, only three months ago the ACC staff testified that no complaints had been filed against the wireline provider in RSA-6 during the three-year period 1992-1994.[22] Appropriately-sized number blocks for resellers in the RSAs (ACC Pet. at 13 and 18-19) was a start-up issue, quickly resolved several years ago, which is unlikely to recur. Appropriate dialing arrangements for calling-party-pays services (Pet. at 14) was an issue dealt with almost a decade ago as an interconnection issue between cellular carriers and wireline telephone companies -- companies the ACC will continue to regulate regardless of the outcome of its instant petition. Continued state cellular rate regulation is certainly not necessary to address any of these articulated concerns.

The ACC finally expresses concern that preemption of its rate regulation "will jeopardize [its] ability to insure that universal service objectives are attained." Pet. at 7. Once again, it is not apparent how regulation of rates is necessary to impose a universal service obligation on "all telecommunications

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[21]This concern for entertaining consumer complaints is puzzling given that the ACC does not regulate cellular service at retail. There is no retail tariff under which consumers would file complaints, if any.

[22]*See* ACC Staff Report, Docket No. U-2576-94-019, at p.5.

service providers." Ibid. If it were, the ACC has already "jeopardized" its stated universal service concern by deregulating all CMRS providers other than wholesale cellular carriers. In any event, the ACC fails to meet the statutory burden established by Congress. Section 332(c)(3)(A) states that universal service obligations may be imposed on CMRS providers only "where such services are a substitute for landline telephone exchange service for a substantial portion of the communications within [the] State." The ACC petition has not established that any CMRS provider meets this condition.

In summary, Congress has specified two circumstances which may justify an exemption to its federal rate preemption, but the ACC has not demonstrated that either condition is present in Arizona. To the contrary, the evidence affirmatively demonstrates those conditions are not present.

B. Other Reasons Support Denial of the ACC Petition

Congress has made clear that this Commission, "in considering the scope, duration or limitation of any State regulation, shall ensure that such regulation is consistent with the overall intent of this subsection." Conference Report at 494. In fact, the regulatory scheme the ACC wants this Commission to approve undermines the very two objectives which led Congress to establish a new federal regulatory scheme for the CMRS market and to preempt state rate regulation over CMRS providers.

Congress amended Section 332(c) to avoid imposition of intrusive, unnecessary and disparate regulatory burdens on CMRS providers, Congress deciding that the CMRS marketplace should be governed by the forces of

competition rather than through the intervening hand of regulation.[23] Congress thus directed this Commission to evaluate carefully not only the "scope" of a state's proposed regulation, but also its "duration or limitation"[24]:

> If the Commission grants such [state] petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. 47 U.S.C. § 332(c)(3)(B)(emphasis added).

The ACC wants this Commission to approve a regulatory regime applicable to only one partial category of CMRS providers (wholesale cellular providers) which it freely admits is "detailed" and similar to what it imposes on wireline telephone companies (but not other CMRS providers).[25] What is more, the ACC wants this Commission to approve continuation of this "detailed regulatory structure" on wholesale cellular carriers even though the ACC readily concedes that this "detailed structure" is no longer appropriate to protect the public interest and will, as a result, be changed in the near future:

> Arizona's regulatory framework . . . will change within the next twelve months with the institution of streamlined and expedited requirements for qualifying companies. * * * Clearly, a change in Arizona's regulatory structure is both necessary and imminent. * * * [I]t is expected that the resulting standards and rules . . . will modify existing regulation so as . . . to allow for greater pricing flexibility than is currently available . . . CMRS providers will be among the beneficiaries of this regulatory reform. Pet. at 5-7 and n.5.

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[23]*See, e.g.*, Second CMRS Order, 9 FCC Rcd at 1504 ¶ 250.

[24]*See* Conference Report at 494.

[25]Pet. at 2. *See also* id. at 8 ("The ACC regulates cellular wholesale providers much as it regulates any other provider of public telephone service.").

At bottom, the ACC's basic position is "trust us"; it will eventually impose a (still undefined) streamlined level of regulation that it thinks is appropriate for cellular wholesale carriers. This "trust us" approach, however, is at complete odds with the governing statute and this Commission's rules applying the statutory requirements.

There is a fundamental disagreement between the ACC and Congress over how the CMRS market should develop, and it is this disagreement which leads the ACC proposal to be at such odds with the Congressional directive and the Congressional objectives. The ACC's preference is to regulate services it thinks are "essential," whether or not the services are provided in a competitive market. In contrast, Congress has decided that CMRS services are competitive and that the CMRS market should develop by the forces of competition rather than the intervening hand of regulation.[26] Given the supremacy clause in the United States Constitution, this is a judgment call which Congress is entitled to make.

V. Conclusion

The ACC asserts that this Commission's "process has been tainted with a strong undercurrent of bias and predetermination in favor of preemption" and that this Commission has "impos[ed] unreasonable criteria and standards for the exemption" to federal preemption.[27] The ACC further

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[26]Congress preempted state regulation to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." House Report at 260.

[27]Pet. at 21. The ACC makes this unsubstantiated claim even though, unlike other states, it chose not to participate in the development of the FCC's rules for state petitions and chose not to seek reconsideration of the rules ultimately adopted.

"urges" this Commission to be mindful of the fact that the ACC's regulatory responsibilities "are clearly articulated in the state's constitution and statutes." Pet. at 20.

This Commission has the responsibility to execute the directives which Congress imposes -- notwithstanding the ACC's pleas for continued state authority. This Commission's orders implementing the Budget Act properly discharge those responsibilities because it was Congress which specified that states bear the burden to demonstrate that they meet the criteria it imposed. As such, the ACC's real "beef" is with Congress, not with this Commission.

Congress has decided that a "Federal regulatory framework [must] govern the offering of all commercial mobile services." Conference Report at 490. It has decided to replace the traditional mixture of uneven state and interstate regulation of mobile services with an approach that brings all mobile services under a comprehensive, consistent regulatory framework.[28] For this reason, Congress preempted all state regulation over entry and rates of CMRS services and it established specific (and narrow) criteria which a state must meet to obtain an exception to this preemption.

Congress sought to achieve two objectives in establishing this new, federal framework. First, it wanted to stop the past practice whereby different CMRS providers were regulated differently, Congress determining that competition will flourish only if all CMRS providers are subjected to the same set of regulations. Second, Congress wanted to ensure that only the appropriate level of regulation is imposed on CMRS providers, deciding that the

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[28] *See* Second CMRS Report, 9 FCC Rcd at 1417.

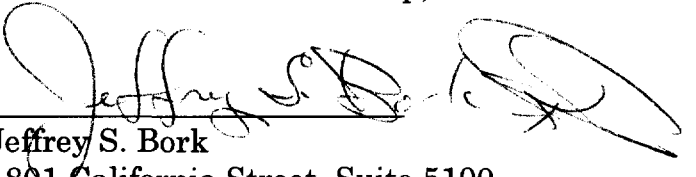
CMRS market is best governed by the forces of competition rather than by regulation.

The ACC proposal frustrates both objectives. The ACC proposes to regulate one set of broadband CMRS providers (wholesale cellular) while leaving their competitors (*e.g.*, IMTS, wide-area SMR, cellular resellers, broadband PCS) free from similar regulatory obligations. In addition, the ACC wants this Commission to authorize a level of regulation which the ACC itself admits is intrusive, no longer appropriate and must be changed.

The ACC proposal is, in short, the very type of disparate and unreasonably intrusive regulatory regime that Congress sought to eliminate in establishing its new federal regime and in preempting the states. Under the criteria established by Congress, and given the facts as they exist in Arizona, this Commission has no choice but to deny the ACC petition.

Respectfully submitted,

U S WEST NewVector Group, Inc.



Jeffrey S. Bork
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Denver, CO 80202
303-672-2700

Laurie Bennett, Of Counsel

September 19, 1994

U S WEST NewVector Group, Inc.
PR File No. 94-SP2
September 19, 1994

Attachment A

Important Regulatory Approval Dates for the Arizona RSA Cellular Licensees

	The "A" Non-wireline Licensee	The "B" Wireline Licensee
RSA-1 (Mohave)		
FCC Construction Permit	Aug. 4, 1989	Sept. 16, 1992*
FCC License	Jan. 14, 1991	Dec. 21, 1992
ACC Certificate	Dec. 20, 1990	Dec. 29, 1992
RSA-2 (Coconino)		
FCC Construction Permit	Jan. 8, 1993**	June 9, 1989
FCC License	Jan. 8, 1993	Jan. 29, 1991
ACC Certificate	May 2, 1994	Sept. 21, 1990
RSA-3 (Navajo)		
FCC Construction Permit	March 13, 1989	Sept. 29, 1989
FCC License	Aug. 27, 1990	March 27, 1991
ACC Certificate	Aug. 22, 1990	Jan. 16, 1991

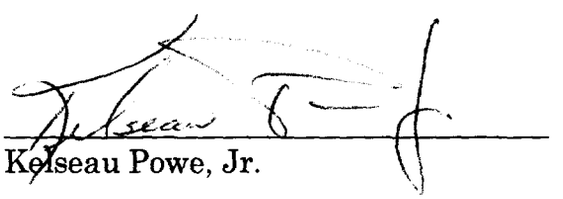
* The delay in FCC licensing of the Arizona RSA 1B cellular system resulted from litigation regarding the Fort Mojave Indian Tribe's eligibility for wireline frequencies. The Tribe won the FCC lottery on November 9, 1988, but the subsequent litigation was not resolved until November 20, 1991, and the initial construction permit authorization for that system was not issued until September 16, 1992.

** The delay in FCC licensing of the Arizona RSA 2A cellular system resulted from litigation regarding qualifications of the lottery winner's eligibility for a cellular license based upon alien ownership. The FCC upheld dismissal of the applications on November 20, 1991. The initial license was subsequently re-lotteried and granted on January 8, 1993.

	The "A" Non-wireline Licensee	The "B" Wireline Licensee
RSA-4 (Yuma)		
FCC Construction Permit	March 28, 1989	July 19, 1989
FCC License	Sept. 13, 1990	Dec. 14, 1990
ACC Certificate	July 19, 1990	Sept. 21, 1990
RSA-5 (Gila)		
FCC Construction Permit	March 13, 1989	March 16, 1990
FCC License	Aug. 15, 1990	April 1, 1991
ACC Certificate	July 19, 1990	Feb. 25, 1991
RSA-6 (Graham)		
FCC Construction Permit	July 19, 1989	July 31, 1989
FCC License	Jan. 10, 1991	Jan. 28, 1991
ACC Certificate	Jan. 18, 1991	Dec. 20, 1990

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 19th day of September, 1994, I have caused a copy of the foregoing **U S WEST NEWVECTOR OPPOSITION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

***Via Hand-Delivery**

(SP1-8'94.COS/JB/lh)

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